Office - Supreme Court, U.S.
FILED
SEP 18 1957
JOHN T. PEY, Clerk

No. 118

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Petitioner*,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN STOCK YARDS ASSOCIATION, AMICUS CURIAE

FREDERIC P. LEE
1200 18th Street, N. W.
Washington 6, D. C.
Attorney for American Stock Yards Association

TABLE OF CONTENTS

	Page
Preliminary Statement	1
Statement of Interest of the American Stock Yards Association	4
Summary of Argument	5
Argument	8
I. The Buying and Selling of Livestock by Commission Firms is a Privilege That May Be Restricted by Reasonable Regulations of a Stockyard Company	11
A. Under the Regulatory Plan a Stockyard Company Has Primary and Initial Authority to Adopt Reasonable Regulations for the Conduct of Its Business	11
B. Regulations of a Stockyard Company May Provide the Method Through Which the Service of Buying and Selling Livestock on a Commission Basis is Furnished	16
C. Under Stockyard Company Regulations Buying and Selling Livestock at a Stockyard by Commission Firms Is a Privilege	17
D. The Privilege Has Been Subjected to Numerous Varying Limitations by Stockyard Company Regulations, Including Limitations Relating to Interference With The Normal Flow of Livestock	21
II. An Evidentiary Hearing Would Have Shown That the Contested Regulation is in Furtherance of the Policy of Congress	24
III. The Judgment of The Court Of Appeals Unlawfully Denies the Right of the Stockyard Company to an Evidentiary Hearing	30
A. There are Genuine Material Issues Of Fact	30

Page

B. The Court of Appeals Judgment Would Convert the Administrative Proceeding Into One That Denies the Stockyard Company an Evidentiary Hearing. 33

C. The Stockyard Company Has a Right to an Evidentiary Hearing Before Its Regulation Is Held Invalid 35

D. The Court of Appeals is Not Authorized To Deprive the Secretary of Agriculture of His Primary Jurisdiction In The Matter... 36

E. The Court of Appeals is Not Authorized To Exercise Essentially Administrative Functions 37

Conclusion 38

TABLE OF CITATIONS

CASES:

Addison v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944) 38
Ambassador, Inc. v. *United States*, 325 U.S. 317 (1945) 12, 37
Bass v. *Hoagland*, 172 F. 2d 205 (CA 5, 1949)..... 32
Cella v. *United States*, 208 F. 2d 783 (CA 7, 1953) 29
Chicago, St. Louis, and New Orleans R. Co. v. *Pullman Southern Car Co.*, 139 U.S. 79 (1891) 17
Daniels v. *United States*, 242 F. 2d 39 (CA 7, 1957) 29
Donovan v. *Pennsylvania Co.*, 199 U.S. 279 (1905).. 17
Far East Conference v. *United States*, 342 U.S. 570 (1952) 37, 38
Federal Communications Commission v. *Pottsville Broadcasting Company*, 309 U.S. 134 (1940)..... 38
Federal Power Commission v. *Idaho Power Company*, 344 U.S. 17 (1948) 38
Federal Trade Commission v. *Morton Salt Co.*, 334 U.S. 37 (1948) 38
Friedman v. *Washburn Company*, 145 F. 2d 715 (CA 7, 1944) 32
Houfburg v. *Kansas City, Stock Yards Company*, 283 S.W. 2d 539 (Mo., 1955)..... 12

Page

Interstate Commerce Commission v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913) ... 12, 14, 35
Kelly v. *Union Stockyards and Transit Co. of Chicago*, 190 F. 2d 860 (CA 7, 1951) 37
Lichten v. *Eastern Airlines*, 189 F. 2d 939 (C.A. 2, 1951) 12, 37
Morgan v. *United States*, 298 U.S. 468 (1936) 36
Morgan v. *United States*, 304 U.S. 1 (1938) 36
New England Divisions Case, 261 U.S. 184 (1923) 35
Platt v. *Lecocq*, 158 F. 723 (C.A. 8, 1907) 13
In re *Producers Livestock Marketing Association and Western Livestock Order Buyers*, 14 Agr. Dec. 109 (1955) 29
Smith, Gilbert R. v. *Union Stock Yards Company*, 9 Agr. Dec. 588 (1950) 20
Sugar Institute v. *United States*, 297 U.S. 553 (1936) 10
Sullivan v. *Union Stockyards Co.*, 26 F. 2d 60 (CA 8, 1928) 12
Swift and Company v. *United States*, 343 U.S. 373 (1952) 10
Tagg Brothers and Moorhead v. *United States*, 280 U.S. 420 (1930) 12
Texas and Pacific Ry. Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 13, 37
The Express Cases, 117 U.S. 1 (1886) 16
United States, v. *Fruit Growers Express Co.*, 279 U.S. 363 (1929) 17
United States v. *Morgan*, 307 U.S. 183 (1939) 13, 37
United States v. *Sklar*, 13 Agr. Dec. 583 (D.C. Texas, 1954) 29
United States v. *Western Pacific R. Co.*, 352 U.S. 59 (1956) 37
Woerth v. *United States*, 231 F. 2d 822 (CA 8, 1956) 27, 29

STATUTES AND REGULATIONS:

Packers and Stockyards Act, 1921, 7 USC § 181, et seq.
Section 301(b) 16
Section 302(a) 16
Section 303 ..... 20, 27
Section 307 12
Section 310 ..... 12, 14, 33, 35, 36, 37
Section 407 15

Page

Code of Federal Regulations, Volume 9, Part 201

Section 201.4 15
Section 201.10 ..... 20, 28
Section 201.17 16
Section 201.31 28
Section 201.40 28
Section 201.43 28
Section 201.45 28
Section 201.47 28
Section 201.55 28
Section 201.58 28
Section 201.61(a) 15
Section 201.61-201.67 28
Section 201.63 23
Section 201.71 28
Section 201.73 28
Section 201.79(b) 20
Section 201.82 28

Statutes at Large

34 Stat. 589 11
36 Stat. 544 11
39 Stat. 734, 735 11
48 Stat. 1070, 1072 11
49 Stat. 558 11
52 Stat. 822, 823 11
52 Stat. 964 11
52 Stat. 992, 1018 11
54 Stat. 934, 937 11
56 Stat. 286, 288 11

United States Code

15 U.S.C. §§ 717c, 717d 11
46 U.S.C. §§ 816, 817 11
46 U.S.C. § 845a 11
47 U.S.C. §§ 201, 205 11
49 U.S.C. § 1(6) 11
49 U.S.C. § 15(1) 11
49 U.S.C. § 316 11
49 U.S.C. §§ 483, 642 11
49 U.S.C. §§ 905, 907 11
49 U.S.C. §§ 1004, 1006 11

CONGRESSIONAL DOCUMENTS: Page

House Document 1297, 65th Cong., 2d sess. 25
House Report 1297, 66th Cong., 3d sess. 25
House Report 77, 67th Cong., 1st sess. 11
House Report, 1048, 85th Cong., 1st Sess. 24, 27
Senate Report 704, 85th Cong., 1st sess. 26

FEDERAL TRADE COMMISSION REPORT:

Meat Packing Industry (1918) 24, 25

MISCELLANEOUS:

R. C. Ashby, Essentials of Livestock Marketing (1953) 26
Gerald Engleman, The American Livestock Auction Market, Marketing Research Division, United States Department of Agriculture (1956) 24
Stewart H. Fowler, The Marketing of Livestock and Meat (1957) 26, 27
Marketing, Yearbook of Agriculture, United States Department of Agriculture (1954) 26

STOCKYARD COMPANY TARIFF REGULATIONS (see Appendix to this Brief):

Baltimore 1a
Buffalo 2a
Cincinnati 3a
Cleveland 4a
Denver 5a
Detroit 7a
Evansville 8a
Fargo 9a
Fort Worth 11a
Houston 12a
Indianapolis 12a
Kansas City 14a
Los Angeles 15a
Louisville 17a
Milwaukee 19a
Ogden 19a
Omaha 20a
Peoria 20a
Portland 20a

Page

St. Joseph 21a
St. Louis (Mississippi Valley) 22a
St. Louis (National) 22a
St. Paul 22a
Salt Lake 24a
San Antonio 24a
San Francisco 26a
Sioux City 26a
Sioux Falls 26a
Stockton 28a
Wichita 30a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 118

EZRA TAFT BENSON, Secretary of Agriculture of the United States, *Petitioner*,

v.

PRODUCERS LIVESTOCK MARKETING ASSOCIATION, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

---

BRIEF FOR THE AMERICAN STOCK YARDS ASSOCIATION, AMICUS CURIAE

PRELIMINARY STATEMENT

This brief is filed with consent of the parties pursuant to Rule 42(2) of this Court. The brief is in support of the position of the petitioner, the Secretary of Agriculture.

The American Stock Yards Association is a voluntary association organized in 1932, having as members 39 terminal stockyard companies regulated by the Secretary of Agriculture under the Packers and Stockyards Act, 1921 (42 Stat. 159, 7 U.S.C. § 181, et seq.), as follows:

Belt Rail Road and Stock Yards Company (Indianapolis Stock Yards), Indianapolis, Indiana
Bourbon Stock Yard Company, Inc., Louisville, Kentucky
The Buffalo Stock Yards, East Buffalo, New York
The Cincinnati Union Stock Yard Company, Cincinnati, Ohio
The Cleveland Union Stock Yards Company, Cleveland, Ohio
The Denver Union Stock Yard Company, Denver, Colorado
Detroit Stock Yards, Detroit, Michigan
The Evansville Union Stock Yards Co., Inc., Evansville, Indiana
Fort Worth Stockyards, Fort Worth, Texas
Jersey City Stock Yards, Inc., Jersey City, New Jersey
Joplin Stockyards Inc., Joplin, Missouri
Kansas City Stock Yards Company, Kansas City, Missouri
Los Angeles Union Stockyards Company, Los Angeles, California
Milwaukee Stockyards, Milwaukee, Wisconsin
Mississippi Valley Stockyards, St. Louis, Missouri
The Ogden Union Stockyards Company, Ogden, Utah
Oklahoma National Stock Ya ls Co., Oklahoma City, Oklahoma
Old Union Stockyards Co., Spokane, Washington
The Peoria Union Stock Yards Co., Inc., Peoria, Illinois
Port City Stockyards Co., Inc., Houston, Texas

Portland Union Stock Yards Company, North Portland, Oregon
Salt Lake Union Stock Yards, North Salt Lake, Utah
Sioux City Stock Yards Company, Sioux City, Iowa
Sioux Falls Stock Yards Company, Sioux Falls, South Dakota
South Memphis Stock Yards Co., Memphis, Tennessee
South San Francisco Union Stockyards, South San Francisco, California
Springfield Stockyards Co., Springfield, Illinois
Stockton Union Stockyards, Stockton, California
St. Joseph Stock Yards Co., South St. Joseph, Missouri
St. Louis National Stockyards Co., National Stock Yards, Illinois
St. Paul Union Stockyards Company, South St. Paul, Minnesota
Union Stock Yards Co., Dayton, Ohio
Union Stock Yard Co., Lancaster, Pennsylvania
Union Stock Yard & Market Co., New York, New York
Union Stock Yard Company of Baltimore County, Maryland, Baltimore, Maryland
Union Stockyards Company of Fargo, West Fargo, North Dakota
Union Stock Yards Company of Omaha (Ltd.), Omaha, Nebraska
Union Stock Yards San Antonio, Inc., San Antonio, Texas
The Wichita Union Stock Yards Company, Wichita, Kansas

The member companies have authorized and directed the Association to file this brief as their representative and on their behalf.

STATEMENT OF INTEREST OF THE AMERICAN STOCK YARDS ASSOCIATION

The Denver Union Stock Yard Company regulation here in controversy is not an isolated phenomenon. It is part of a long-standing pattern throughout the stockyard industry. The member companies of the Association have established and are enforcing numerous regulations that enable patrons of the public market at the stockyards to receive the stockyard services to which they are entitled by law, both from the companies and from the market agencies that are permitted to conduct their business at the yards and act in a fiduciary capacity in buying and selling livestock for the patrons of the yards.

Unless the decision of the Court of Appeals is reversed, the regulations of the members of the Association and other stockyard companies may be nullified by the courts, and the Secretary of Agriculture compelled to nullify them, on records (a) completely devoid of evidence as to any unreasonableness of the regulations or as to any failure of the regulations to conform to the public interest, and (b) without any initial determination as to unreasonableness and findings thereon by the Secretary in the exercise of his primary jurisdiction under title III of the Act.

The regulatory plan provided by Congress would be upset if the Secretary were required to determine the reasonableness of important industry regulations, and pass on their validity, without the evidentiary hearing the Act has heretofore been held to require. The stockyard companies could not effectively function in carrying out their obligation as a public utility to see to it that reasonable stockyard services are furnished the patrons.

SUMMARY OF ARGUMENT

The Court of Appeals' decision ignores and upsets the statutory plan that Congress has provided in the Packers and Stockyards Act, 1921, for determining the reasonableness of regulations of a public stockyard company. The plan provided by the Act was taken by Congress directly from that which it had previously provided for railroads under the Interstate Commerce Act. It is the plan customarily used in the field of common carriers and public utilities. Congress has applied it not only to railroads and stockyard companies but also to motor carriers, air carriers, water carriers in domestic commerce, freight forwarders, carriers by wire or radio, natural gas companies, intercoastal water carriers, and water carriers in foreign commerce.

The statutory plan recognizes that a common carrier or public utility company has initial authority at common law to prescribe regulations for the conduct of its business. The regulations must be reasonable and the burden is on him who attacks, to show that a regulation is unreasonable. By statute, Congress provides that any such attack shall, in the first instance, be made before an administrative agency, not the courts, and that the agency may not hold the regulation invalid unless there has been an administrative hearing (which this Court has said shall be an evidentiary hearing) and findings and an order based thereon. If the administrative agency finds a company regulation invalid in any particular, it may then prescribe the reasonable regulation thereafter to be observed.

A public stockyard company has the duty to furnish reasonable stockyard services to farmers and

other patrons. If a farmer chooses not to handle the sale of his own livestock at the stockyard, then the stockyard company has the duty to furnish him services for the sale of his livestock on a commission basis. The stockyard company may do this through its own employees or other instrumentalities. In practice it furnishes such services through affording free to a limited number of market agencies (commission firms) the privilege of doing business at the yards. Such commission firms are instrumentalities, not patrons, of the stockyard company.

The situation is analogous to that of railroads that have, for instance, the duty to furnish the public express and sleeping car services. Under the decisions of this Court a railroad may, if it so determines, furnish such services through one or more corporate instrumentalities, such as express companies and sleeping car companies, but without permission of the railroad, those instrumentalities have no right to conduct their business on the railroad. As this Court has said, a railroad is not a common carrier of express or sleeping car companies.

The contested regulation of the stockyard company imposes restrictions on commission firms that have been given the privilege of selling consigned livestock at the stockyard on a commission basis. That privilege has long been subject by regulations of various stockyard companies to numerous conditions. These conditions are designed to see to it that the farmer receives reasonable services and to protect the status of the stockyard as an adequate mechanism for establishing accurate livestock prices. Many of these regulations (see Appendix to this Brief) relate to the solicitation and diversion of livestock by commission firms

for or to other markets, particularly to private markets where there is no competitive bidding and where practices of commission firms are not subject to regulation by the Secretary of Agriculture.

Respondent commission firm complained, before the Secretary of Agriculture, of the unreasonableness of such a regulation. However, it refused to place of record any evidence that the regulation was unreasonable or to participate in a hearing on that issue. Having in mind the statutory prohibition against holding a company regulation invalid unless there has first been an evidentiary hearing, and findings and an order based thereon, the Secretary held, through his Judicial Officer, that on a record void of all evidence as to unreasonableness, he could not find the regulation invalid on its face. The Secretary, therefore, dismissed the complaint.

Nevertheless, on appeal from the Secretary, the Court of Appeals held the company regulation invalid on its face and directed the Secretary to issue a cease and desist order against enforcement of the regulation. The lower court did this despite genuine, material issues of fact raised by the pleadings. In so doing, the lower court denied the stockyard company the evidentiary hearing that the stockyard company demanded and that the Act requires before a company regulation may be held invalid. The lower court ignored the primary jurisdiction of the Secretary under the Act to determine the question of unreasonableness. It denied the Secretary his statutory authority, if he finds a company regulation unreasonable in any particular, to prescribe the just, reasonable and non-discriminatory regulation thereafter to be observed.

An evidentiary hearing would have afforded an opportunity by the company to pre evidence as to the reasonableness of the regulation and its relationship to the Congressional policy embodied in the Act. In the absence of such a hearing, and findings and order thereon, the Court of Appeals has no authority to hold the regulation invalid "on its face" or on the basis of facts not of record but conjectured by the court. The court has no authority to dispense with the statutory plan.

ARGUMENT

The regulation in controversy of the Denver Union Stock Yard Company applies to market agencies (commission firms) granted permission by the company to buy and sell livestock at the yard on commission and for the account of patrons of the yard; also to dealers granted permission by the company to buy and sell livestock at the yard for their own account. The regulation is designed to prevent market agencies and dealers from engaging in practices that impair the quality of the stockyard services received by patrons of the yard. Thus the regulation prohibits the market agencies and dealers from soliciting business for other markets, for sale at outside feed yards or country points, from endeavoring to secure customers to sell or purchase livestock off the Denver yard, and from diverting from the Denver yard the normal flow of livestock to it. The text of the regulation appears in the Appendix to this Brief at pages 6a-7a. The regulation in no wise restricts farmers and stockmen as to the stockyard or other place where they may choose to sell their livestock.

Commission firms are one of the instruments through which a public stockyard may function. They are not, themselves, patrons of the yard. They serve the

patrons of the yard, the farmers or other shippers who send livestock to the yard. They serve as agents in a fiduciary capacity and occupy a position of trust.

Commission firms are vital to the pricing mechanism of the yard. Their activities are of utmost importance in establishing the level of prices for livestock. Their activities affect the reputation of the yard and its good will. Commission firms have a duty to refrain from activities that impair the service rendered patrons of the yard.

The record does not contain any evidentiary facts as to what is the effect of the regulation. Respondent, Producers Livestock Marketing Association, while complaining (R. 40) that the contested stockyard company regulation is "unjust, unreasonable, and discriminatory", elected (R. 72) not to place in the record any facts showing that the regulation is unjust, unreasonable, or discriminatory in its effect. Respondent elected to rely solely on the "face" of the regulation. It filed before the Secretary of Agriculture an "Election to Rest" (R. 72) in which it stated:

> "that the challenged regulation . . . is illegal and invalid upon its face as a matter of law, that this complainant elects to stand upon the illegality of said regulation, as a matter of law, and states that it will not present evidence in this cause, as the taking of evidence is unnecessary to determine illegality of said regulation as a matter of law.
>
> Wherefore the complainant hereby rests and submits its case for final decision by the Secretary of Agriculture."

As a result of this action, the Producers Livestock Marketing Association presented in the record no facts

relating to the unreasonableness of the regulation, notwithstanding that this Court has stated that "unreasonableness" is not made out by mere assertion, but is a question of relation and degree demanding close scrutiny of the facts. *Swift & Co.* v. *United States*, 343 U.S. 373, 383 (1952); *Sugar Institute* v. *United States*, 297 U.S. 553, 600 (1936).

Respondent's action also had the effect of preventing any evidentiary hearing (R. 73). It insisted that no hearing was required and refused to attend the hearing set.[1]

Under these circumstances created by respondent the Secretary held that "upon the limited record before us we cannot find that the contested regulation of the respondent is invalid upon its face" (R. 32) and dismissed the complaint. The Secretary thereby preserved the right of the stockyard company to an evidentiary hearing before the regulation was held invalid. The action of the Court of Appeals in holding the regulation invalid on its face and directing the Secretary to annul it without an evidentiary hearing, shows misunderstanding of the legal status of stockyard company regulations and of the statutory plan for reviewing them.

---

[1] The docket file before the Secretary of Agriculture (P&S Docket No. 2176) which is a public record, shows that at the same time respondent by letter transmitting the "Election to Rest" stated that—

> "This, of course, will mean that no hearing will be required on January 24, 1956, *or at any other time*" (emphasis supplied). See R. 35, item (26).

I. The Buying and Selling of Livestock by Commission Firms Is a Privilege That May Be Restricted By Reasonable Regulations of a Stockyard Company.

A. Under the Regulatory Plan a Stockyard Company Has Primary and Initial Authority to Adopt Reasonable Regulations for the Conduct of Its Business.

The regulatory plan provided by Congress in Title III of the Packers and Stockyards Act, 1921, is that customary in the field of public utilities and common carriers. The plan is that applied by Congress to regulations adopted by railroad companies for the conduct of their business (34 Stat. 589, 36 Stat. 544, as am., 49 USC §§ 1(6) and 15(1)), and also to regulations of motor carriers (49 Stat. 558, 49 USC § 316), air carriers (52 Stat. 992, 1018, 49 USC §§ 483, 642), freight forwarders (56 Stat. 286, 288, 49 USC §§ 1004, 1006), carriers by wire or radio (48 Stat. 1070, 1072, as am., 47 USC §§ 201, 205), natural gas companies (52 Stat. 822, 823, 15 USC §§ 717c, 717d), and common carriers by water in domestic commerce (54 Stat. 934, 937, 49 USC §§ 905, 907), in intercoastal commerce (52 Stat. 964, 46 USC § 845a), and in foreign commerce (39 Stat. 734, 735, as am., 46 USC §§ 816, 817). The decision of the Court of Appeals, if applied to regulations of public utility and common carriers in these fields, would have equally vitiating effects.

Specifically Congress, in the case of stockyards, followed the regulatory plan for railroads as then in effect under the Interstate Commerce Act. In its report on the bill the Committee on Agriculture, House of Representatives, said, with respect to the stockyards title of the Act (H. Rept. 77, 67th Cong., 1st sess., p. 10)—

> "The procedure and language are modeled very closely on the interstate commerce act, and the Secretary of Agriculture is given substantially the same jurisdiction over stockyard matters which the Interstate Commerce Commission has over railroads, including the power, after full hearing, to establish and enforce just and reasonable rates and charges for, and practices in connection with, the furnishing of stockyard services."

This Court, in *Tagg Brothers and Moorhead* v. *United States* (280 U.S. 420, 435 fn. 3 (1930)), recognized that the regulatory plan under the stockyards title of the Act follows that for railroads under the Interstate Commerce Act. See also, *Sullivan* v. *Union Stockyards Co.*, 26 F. 2d 60, 61 (C.A. 8, 1928).

Under such plan of regulation the public utility or common carrier has primary and initial authority to establish, observe, and enforce regulations governing the furnishing of its services. *Interstate Commerce Commission* v. *Louisville and Nashville Railroad Co.*, 227 U.S. 88 (1913); *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 326 (1945); *Lichten* v. *Eastern Airlines*, 189 F.2d 939 (C.A. 2, 1951); *Houfburg* v. *Kansas City Stock Yards Company*, 283 S.W. 2d 539, 544 (Mo., 1955). Such regulations are required to be just, reasonable, and non-discriminatory. This limitation of the common law was, in the case of public stockyards, declared by Congress in § 307 of the Act. That section was taken directly from § 1(6) of the Interstate Commerce Act. The regulations of the public utility or common carrier are presumptively reasonable. The burden is on the complainant to prove unreasonableness by competent evidence.

These principles are well stated by the Court of Appeals for the Eighth Circuit in *Platt* v. *Lecocq*, 158 F. 723, 730-731 (1907)—

> "A common carrier has the right to conduct its business in its own way in accordance with the rules of the common and statutory law . . . It has the right to make and enforce reasonable regulations which may lawfully fix the times, the places, the methods, and the forms in which it will receive the various commodities it undertakes to carry, and the rules which it thus adopts are presumably right and reasonable. The burden is on him who assail them to prove that they are unfair and unjust, and it is only when it appears by competent evidence that they are unreasonable that commissions or courts may lawfully interfere to annul or to change them."

The reasonableness of a public utility or common carrier regulation, including that of a stockyard company, was always subject to judicial determination. Legislation modified this scheme by interposing a primary jurisdiction in an administrative agency to determine reasonableness of company regulations upon complaint or upon the agency's own initiative. In the case of the railroads this was provided by § 15(1) of the Interstate Commerce Act which was the source of its counterpart in § 310 of the Packers and Stockyards Act. The administrative agency could hold a regulation unreasonable only after "full hearing". The primary jurisdiction of the administrative agency was recognized by this Court in *Texas and Pacific Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and the primary jurisdiction doctrine there announced has been subsequently followed by this Court and applied to stockyards in *United States* v. *Morgan*, 307 U.S. 183, 190-191 (1939). Also this Court has defined the "full hearing" requisite as being

a requirement for an evidentiary hearing. Thus in *Interstate Commerce Commission* v. *Louisville and Nashville Ry. Co.*, 227 U.S. 88, 91, 92 (1913) this Court said—

> "But the statute gave the right to a full hearing, and that conferred the privilege of introducing testimony, and at the same time imposed the duty of deciding in accordance with the facts proved . . .
>
> Under the statute the carrier retains the primary right to make rates, but if, after hearing, they are shown to be unreasonable, the Commission may set them aside and require the substitution of just for unjust charges. The Commission's right to act depends upon the existence of this fact, and if there was no evidence to show that the rates were unreasonable there was no jurisdiction to make the order."

If, after a full evidentiary hearing, the administrative agency finds that a company regulation is unreasonable, then it is authorized to determine and prescribe the just, reasonable, and non-discriminatory regulation to be thereafter followed by the public utility or common carrier and to order the company to conform to the regulation so prescribed. In the case of stockyards this is set forth in § 310 of the Act taken from § 15(1) of the Interstate Commerce Act.

This regulatory plan applies to the rates, charges, and practices, as well as to regulations, of the public utility or common carrier.

It is this regulatory plan customary in the field of public utilities and common carriers that the Court

of Appeals has upset. It has done so by ignoring the primary jurisdiction of the Secretary of Agriculture to determine unreasonableness of a regulation and to hold the regulation invalid, in whole or in part, only after full evidentiary hearing; also by directing the Secretary (R. 84) to enter a cease and desist order nullifying the regulation without the Secretary's first having exercised his primary jurisdiction to determine and prescribe what would be the just, reasonable, and non-discriminatory regulation thereafter to be followed.

In addition to the Secretary's power to review and determine the reasonableness of a particular regulation of a particular stockyard company, the Secretary has the authority to adopt his own regulations of general applicability to carry out the provisions of the Act (§ 407). These regulations of the Secretary are to be found in 9 C.F.R. Pt. 201. There is no question here of any conflict between the contested regulation of the Denver Union Stock Yard Company and the general regulations of the Secretary. Indeed, the Secretary's regulations, themselves, provide that a market agency shall not enter into any agreement, relationship, or association with buyers which might have a tendency to lessen the loyalty of the market agency to its consignors or impair the quality of the market agency's selling services. 9 C.F.R. § 201.61(a). Moreover, the Secretary's regulations (9 C.F.R. § 201.4) state that they shall not prevent the legitimate application or enforcement of any valid regulation of a stockyard owner.

B. Regulations of a Stockyard Company May Provide the Method Through Which the Service of Buying or Selling Livestock on a Commission Basis is Furnished.

A stockyard is a facility conducted as a public market at which livestock are received, held, or kept for sale or shipment. Act, § 302(a). The services to be rendered by a stockyard company are numerous (Act § 301(b), 9 C.F.R. § 201.17) and they include services in connection with the buying or selling of livestock on a commission basis. Act, § 301(b). The stockyard company may furnish the numerous services required of it as a public utility through its own employees or arrangements with others. The service of buying and selling on a commission basis, however, is commonly furnished through arrangements with a limited number of commission firms (market agencies) that are given the "privileges of the market" by the stockyard company.

The relationship of a stockyard company and the commission firm is similar in many respects to that of a railroad company and express company. In *The Express Cases*, 117 U.S. 1 (1886) this Court held that the railroad has a duty to furnish the public reasonable express service but that it owes no duty to the public as to the particular agencies it may select for that purpose. It may furnish the service through its own employees or select one or more express companies whose employees will furnish the service. The railroad is not a "common carrier" of express companies. They have no right to use the facilities of a railroad.

The situation is the same as to the duty of the railroad to furnish drawing room and sleeping car service. The railroad may use the instrumentality of another

corporation and employ it in order that the railroad may properly discharge its duty to the public. By using such an instrumentality, the railroad does not abandon the duty it owes the public. *Chicago, St. Louis, and New Orleans R. Co.* v. *Pullman Southern Car Co.*, 139 U.S. 79, 89-90 (1891).

So here the stockyard company has a duty to furnish services for buying and selling livestock on a commission basis. It may perform this duty through instrumentalities such as commission firms. The stockyard company need not make use of commission firms but if it does use such firms, the stockyard company does not thereby relieve itself of its duty to see to it that reasonable services are furnished the livestock farmers and shippers. The contested regulation was adopted pursuant to that duty.

See also, *Donovan* v. *Pennsylvania Co.*, 199 U.S. 279, 295-296 (1905); *United States* v. *Fruit Growers Express Co.*, 279 U.S. 363, 368 (1929).

C. Under Stockyard Company Regulations Buying and Selling Livestock at a Stockyard by Commission Firms is a Privilege.

Farmers have a right to buy and sell livestock at any public stockyard without the assistance of a market agency (commission firm). Most stockyard company tariff[1] regulations specify this right. Thus the Denver Union Stock Yard Company provides in paragraph 3(c) of its tariff regulations that—

> "Any owner may handle, offer for sale, and sell livestock upon this Market without the assist-

[1] Tariff provisions cited herein by location of the stockyard and number of the tariff, are set forth in the Appendix to this Brief.

ance of a market agency, and will be furnished without discrimination reasonable facilities and services."

A similar provision with respect to owners and shippers of livestock will be found in the tariff regulations of other yards.[2] The stockyard company has, as its fundamental duty, service to the farmer.

On the other hand, the buying and selling of livestock by market agencies on a commission basis for the account of owners is a privilege. Thus the Denver Union Stock Yard Company states in regulation 1(b) of its tariff that—

> "This Company offers to grant to persons (which term includes individuals, partnerships, corporations, or associations) the privilege of selling, buying, or trading in livestock at this Market, or otherwise of engaging in appropriate business at this Stockyard, subject to the rates, charges and regulations of this Company published and filed with the Secretary of Agriculture, the provisions of the Act, and the applicable regulations of the Secretary of Agriculture, and these and any other regulations, rules, or practices of this Company established for the conduct and operation of this Stockyard."

---

[2] Baltimore No. 11, Reg. 3; Buffalo No. 11, Reg. 2; Cincinnati No. 12, Reg. 12; Cleveland No. 8, Reg. 1(b); Detroit No. 12, Reg. 2; Evansville No. 11, Reg. 1(b); Fort Worth No. 7, Reg. 3; Indianapolis No. 8, Reg. 1(A); Kansas City No. 12, Reg. 4; Los Angeles No. 16, Reg. 3(c); Louisville No. 17, Reg. 1(b); Salt Lake City No. 8, Reg. 2; Ogden No. 12, Reg. 13; Omaha No. 18, Reg. 1; Peoria No. 11, Reg. 5; Portland No. 19, Reg. 6; St. Joseph No. 19, Reg. 2; St. Paul No. 26, Reg. 3(a); San Antonio No. 13, Reg. 3(c); Sioux City No. 16, Reg. 5; Sioux Falls No. 12, Reg. 5; Milwaukee No. 3, Reg. 5; Fargo No. 8, Reg. 3(a); Wichita No. 13, Reg. (B).

and in regulation 4(b)—

> "No person will be permitted to engage in the business of selling or buying livestock on a commission basis or furnishing stockyard services as a market agency without the express permission of this company."

The tariffs of the Los Angeles Union Stockyards Company[3] and the Union Stock Yards San Antonio[4] have substantially similar provisions.

Most other terminal stockyards in their tariff regulations also describe buying and selling livestock at the stockyard by commission men in terms of privilege. Thus some require a "license" from the stockyard owner.[5] Other tariffs require the permission and approval of the stockyard owner.[6] Still others require or may require, an "agreement" or a "contract" with the stockyard owner.[7] Some merely refer to the "privileges".[8]

---

[3] Tariff No. 16, Regs. 1(b), 4(b), and 5(b).

[4] Tariff No. 13, Regs. 2(b), 4(b), and 5(b).

[5] Cleveland No. 8, Reg. 2; Evansville No. 11, Reg. 2; Indianapolis No. 8, Reg. 2; Louisville No. 17, Reg. 2(1).

[6] Salt Lake City No. 8, Reg. 1; Ogden No. 12, Reg. 1; St. Joseph No. 19, Reg. 10.

[7] Baltimore No. 11, Reg. 1; Buffalo No. 11, Reg. 1; Detroit No. 12, Reg. 1; Fort Worth No. 7, Reg. 1; Kansas City No. 12, Reg. 8; Portland No. 19, Reg. 1; Sioux City No. 16, Reg. 8(a); Sioux Falls No. 12, Reg. 8(a); St. Paul No. 26, Reg. 15; San Francisco No. 8, Reg. 8; Milwaukee No. 3, Reg. 10; Fargo No. 8, Reg. 15; Stockton No. 6, Reg. 1; Wichita No. 13, Reg. (A).

[8] Buffalo No. 11; Cincinnati No. 12, Reg. 13; Denver No. 14, Regs. 1(b) and 4; Detroit No. 12, Reg. 12; Fort Worth No. 7; Kansas City No. 12, Regs. 2 and 9; Los Angeles No. 16, Regs. 1(b) and 4; Milwaukee No. 3, Reg. 9; Portland No. 19, Reg. 10; St. Louis (National) No. 9, Reg. XV; St. Louis (Mississippi Valley) No. 8, Reg. 1; San Antonio No. 13, Regs. 2(b) and 4(h).

Whatever form the "license" of the commission firm to conduct its business at the stockyards takes, in all instances the permission of the stockyard owner in some form is required. The fact that the Act (§ 303) and the Secretary's own regulations (9 C.F.R. § 201.10) require registration of market agencies and dealers does not make it mandatory that the stockyard owner under all circumstances grant permission to a market agency or dealer to do business at the stockyard. The Secretary himself, through his Judicial Officer, has held (*Gilbert R. Smith* v. *Union Stock Yards Company*, 9 Agr. Dec. 588, 597 (1950)) that—

> "Mere registration as a market agency with the Secretary of Agriculture does not automatically force a stockyard company under any and all conditions to provide the registrant with facilities to do business."

The Secretary has stated in his own regulations (9 C.F.R. § 201.79(b)) that assignments of pens and facilities for market agencies shall be made—

> ". . . on the basis of the availability of pens and facilities, the need of the registrant for such assignment, volume and kind of livestock handled, the number, size, character, and kind of consignments received or lots purchased, the seniority of the market agency . . ., the operating conditions of the stockyard, and other pertinent considerations: *Provided,* That no assignment, adjustment, or change shall unfairly or unjustly discriminate against any market agency . . . or impair the efficiency of operations or the reasonableness of stockyard services furnished patrons of the market."

D. The Privilege Has Been Subjected to Numerous Varying Limitations by Stockyard Company Regulations, Including Limitations Relating to Interference With the Normal Flow of Livestock.

Regulations of various stockyard companies provide that the company will deny or revoke the privileges of the market (a) to market agencies in excess of a reasonable number sufficient to care efficiently for all livestock coming to the market, or if additional pen and other facilities are not available, or (b) to those that engage in dishonest or fraudulent practices or violate provisions of the Act or regulations of the Secretary or the company, or (c) to those who tamper with locks, gates, or doors of pens or buildings or abuse or destroy company property, or (d) to those who do not have qualifications necessary to perform the marketing services, or (e) to those who do not have the ability to fulfill their financial obligations.

The market agency is required as a condition of the privilege to give a bond conditioned on observing regulations and collecting and paying over to the company all freight, feed, and service charges due the company on livestock handled by the market agency.

Conditions vary greatly at different stockyards calling for different limitations on those engaging in business at the yards. Some stockyards are local in nature; others are terminal yards drawing livestock from more distant areas. Some yards serve farmers primarily; others, country dealers and feed lots. Some serve nearby packers; others are primarily shipping markets and most of the livestock goes forward to other destinations. The facilities and services of the stockyard owners and the practices of the market agencies differ at different yards and require different

regulations. Only a full evidentiary hearing would reveal the factual situation at a particular yard.

Many stockyards face the problem of diversion of the normal flow of livestock to the yard. Such diversion takes different forms. The privilege of a market agency to do business at a stockyard has long been conditioned by various regulations relating to interference with the flow of livestock. Regulation 10(c) of the Denver Union Stock Yard Company is not unique, but fits into the developing pattern of regulating various aspects of the problem.

One of these aspects is the duty a stockyard company owes to the farmer or shipper to see to it that his consignments to a particular commission firm are respected and not interfered with. In consequence, nearly all stockyard companies provide by regulation that a market agency may not divert consignments of livestock by (a) soliciting or otherwise interfering with owners, drivers, or attendants, of incoming trucks or driven-in livestock in streets adjacent to or upon company property; or (b) soliciting or otherwise attempting to cause reconsignment of livestock already consigned to any market agency or dealer doing business on the market.[9]

---

[9] Baltimore No. 11, Reg. 6; Buffalo No. 11, Reg. 4; Cincinnati No. 12, Reg. 10; Cleveland No. 8, Reg. 9; Denver No. 14, Reg. 10(a) and (b); Detroit No. 12, Reg. 4; Evansville No. 11, Reg. 12; Fort Worth No. 7, Reg. 9; Indianapolis No. 8, Reg. 10; Kansas City No. 12, Reg. 14; Los Angeles No. 16, Reg. 10(a) and (b); Stockton No. 6, Reg. 8; Ogden No. 12, Reg. 10; Omaha No. 18, Reg. 4; Peoria No. 11, Reg. 3; Portland No. 19, Reg. 9; Salt Lake City No. 8, Reg. 8; San Antonio No. 13, Reg. 10(a) and (b); Sioux City No. 16, Reg. 9; Sioux Falls No. 12, Reg. 9; St. Paul No. 26, Reg. 8; San Francisco No. 8, Reg. 9; Milwaukee No. 3, Reg. 8; Fargo No. 8, Reg. 8; Wichita No. 13, Reg. C; Stockton No. 6, Reg. 8.

Other regulations prohibit a market agency or dealer from (a) buying, selling, or trading in livestock at a stockyard until the livestock has been delivered to the consignee, or (b) without their permission entering a pen in which sellers and buyers are trading on any livestock contained therein, or (c) trading outside of regular market hours.[10] Some regulations prohibit market agencies and dealers from soliciting, at or near the yards, business for other markets, for sale at outside feed yards, or at country points, or to secure customers to sell or purchase livestock elsewhere, or from diverting or interfering with the normal flow of livestock to the yard.[11] All these regulations have one objective, seeing to it that reasonable stockyard services are rendered to patrons of the yard. The Secretary, himself, adopted in 1954 a regulation providing that no market agency shall solicit consignments of livestock (a) at or on livestock premises, or (b) in designated areas, or (c) after such livestock have been billed or consigned to a market agency and are in course of transportation for delivery to the consignee at a posted stockyard or in a designated area (9 C.F.R. § 201.63).

As marketing conditions have changed, so have diversion regulations been modified to meet them. The Denver regulation is not unique. Los Angeles,[12] San Antonio,[13] and Baltimore,[14] have similar regulations.

---

[10] Denver No. 14, Reg. 10(b); San Antonio No. 13; Reg. 10(b).

[11] Houston No. 4, Supp. 14, Reg. 13(7); Kansas City No. 12, Reg. 10; Ogden No. 12, Reg. 11.

[12] Tariff No. 16, Reg. 10(c).

[13] Tariff No. 13, Reg. 10(c).

[14] Tariff No. 11, Supplement 13, Reg. 14.

Stockton has a somewhat similar requirement in its contract with a market agency.[15]

II. An Evidentiary Hearing Would Have Shown That The Contested Regulation is in Furtherance of the Policy of Congress.

When the Packers and Stockyard Act was passed in 1921, the relatively few livestock markets were nearly all large terminal markets. H. Rept. 1048, 85th Cong., 1st sess., p. 3. Over 90 percent of livestock purchases by packers were made at these terminal markets, less than 10 percent being purchased in the country. Federal Trade Commission Report on the Meat Packing Industry (1918), Pt. 3, p. 110. There are now about 66 of these terminal markets.

Since 1921 the auction livestock markets have developed so that there are now around 2400 of them. Gerald Engleman, The American Livestock Auction Market, published by United States Department of Agriculture, 1956, p. 3.

These terminal and auction markets are public livestock markets. Livestock is sold at these markets on the basis of competitive bidding or auctions.

The Committee on Agriculture, House of Representatives, recently stated (H. Rept. 1048, 85th Cong., 1st sess., p. 3)—

> "Equally significant is the growth which has taken place in country buying—buying by packers or by livestock dealers direct from the producer, without the animals going through a public stockyard or market. There was little or no such buying at the time the Packers and Stockyards Act became law but it is today a common practice in

[15] Tariff No. 6, Reg. 1(A)(b) and Reg. 8. Kansas City has a regulation directed to the same end, Tariff No. 12, Reg. 9.

almost every part of the country and more than 40 percent of all livestock sold moves in this manner."

Thus today 40 percent of the sales of livestock occur at the farm or at country livestock markets variously called concentration yards, country stations, country points, outside feed yards, or assembly points. These are private livestock markets. Livestock is not sold at these markets on the basis of competitive bidding or auctions. They are not competitive markets. Federal Trade Commission Report on Meat Packing Industry (1918), Pt. 3, p. 110.

The Act was passed by Congress largely to remedy evils found by the Federal Trade Commission as the result of its investigation of the food industry directed by President Wilson in 1917. H. Rept. 1297, 66th Cong., 3d sess., p. 23. The Commission had emphasized the need for assuring producers "of a fair market, reasonable charges, open bidding, full and helpful market information, the limitation of violent fluctuations in price, and the elimination of unnatural market influences". H. Doc. 1297, 65 Cong., 2d sess., p. 48. Impairment by a commission firm of the normal flow of livestock to a public livestock market and diversion to a private market at which there is no competitive bidding or no regulation by the Secretary, produces consequences contrary to the Congressional policy embodied in the Act. As a result of respondent's own action the record is bare of evidence as to these consequences and their relationship to the Congressional policy. A full evidentiary hearing would have afforded an opportunity to make of record facts showing that the contested regulation is in furtherance of Congressional policy.

Thus central markets are basic to price formation and accurate valuation is important. Marketing, Yearbook of Agriculture 1954, United States Department of Agriculture, pp. 49-50.

> "Price determination is . . . accomplished most effectively and most satisfactorily in a truly competitive and open market. . . . The public terminal livestock market—a really competitive market—renders an outstanding service in its method of price determination. First, because its livestock prices are arrived at by bargaining between buyers and the commission salesmen. Second, because only on the public terminal market is the stockman served by experienced salesmen, working solely in the stockman's interest." Prof. R. C. Ashby, Essentials of Livestock Marketing, Department of Livestock Marketing, Morningside College (1953), pp. 24-25.

A terminal livestock market, to adequately perform its functions, must have a large supply of all qualities of livestock, a large number of buyers, and a large amount of buying. Reduction in number of transactions through diversion affects the adequacy of the market as a pricing mechanism. See, Stewart H. Fowler, The Marketing of Livestock and Meat (1957), pp. 219, 184. Accuracy of pricing at terminal stockyards is in the public interest. The Secretary, himself, has pointed out the necessity for effectively preventing or uncovering "many important restrictive, discriminatory or monopolistic practices at points away from public stockyards affecting the prices to be paid at public stockyards". S. Rept. 704, 85th Cong., 1st sess., pp. 22-23.

At the Denver yard, respondent must bid for the purchase and sale of livestock in competition with other market agencies on that yard. To the extent

that respondent can divert transactions to private concentration yards at country points where respondent alleges it operates (R. 40), it does not have to sell under competitive bidding conditions or in competition with other market agencies. There is elimination of competition.

Further, to the extent that respondent diverts the normal flow of livestock to "unposted" markets, buying and selling occurs at markets where practices are unregulated by the Secretary.

Of the 66 terminal stockyards, all are "posted" and therefore regulated under the Act by the Secretary of Agriculture. Of the auction livestock markets 439 are posted and it is estimated 500 more are eligible for posting and regulation by the Secretary. H. Rept. 1048, 85th Cong., 1st sess., p. 3.

There are, however, an additional 1400 or 1500 public livestock markets, either auction markets or small stockyards, which are not regulated by the Secretary nor eligible for posting and regulation, because of the size limitation in section 302(a) of the Act. H. Rept. 1048, 85th Cong., 1st sess., p. 3. Neither is the large, but unknown, number of private concentration yards (see, Stewart Fowler, The Marketing of Livestock and Meat (1957), pp. 294-300) subject to regulation by the Secretary. At unregulated yards producers lose the protection of the Act except where the transaction at the unregulated yard originated at a regulated yard. *Woerth* v. *United States,* 231 F. 2d 822 (C.A. 8, 1956).

The Secretary's regulations protect producers in various ways at "posted", i.e., regulated, stockyards. Market agencies (commission firms) are required to

be registered and to have a bond conditioned on prompt accounting and payment to owners of the proceeds of the purchase price. 9 C.F.R. §§201.10 and 201.31(a). A market agency may not use shippers' proceeds for its own purposes prior to payment over to the shipper. 9 C.F.R. § 201.40. Such agencies are required to keep records and to make them available for inspection by owners of livestock. 9 C.F.R. §201.43, §201.45. Market-agencies may not sell or dispose of consigned livestock to any person in whose business the market agency has a financial interest or to any person who has a financial interest in the market agency, unless the nature of the relationship is disclosed, and then only if the purchaser's bid exceeds that of other bidders. 9 C.F.R. §201.47. Sales are to be made on the basis of actual weights shown on the scale ticket. 9 C.F.R. §201.55. Scales are required to be accurate and tested and scale operators to be competent. 9 C.F.R. §201.71 and §201.73. Sales are to be made to the highest bidder without inter-mingling and not conditioned on sales of other consignments. 9 C.F.R. §201.58. A market agency may not use consigned livestock to fill orders which it has received from buyers, clear or finance dealers, split commissions, employ packers or dealers, or be owned or financed by packers or dealers. 9 C.F.R. §§201.61-201.67. Reasonable care and promptness is required in yarding, feeding, watering, weighing, and handling livestock to prevent waste of feed, shrinkage, injury, death or other avoidable loss. 9 C.F.R. §201.82. There are numerous other regulations. 9 C.F.R., Pt. 201.

Many decisions of the courts attest to the occurrence of improper practices by market agencies in the purchase and sale of livestock. For recent decisions see,

for example, *Daniels* v. *United States*, 242 F.2d 39 (C.A. 7, 1957); *Cella* v. *United States*, 208 F. 2d 783 (C.A. 7, 1953); *United States* v. *Sklar*, 13 Agr. Dec. 583 (D.C. Texas, 1954), not otherwise reported; *Woerth* v. *United States*, 231 F. 2d (C.A. 8, 1956). Another example is the case in which the respondent here consented to entry of a cease and desist order by the Secretary restraining it from engaging in such practices as issuing accounts of purchase and invoices representing the weight of livestock to be more than the true weight; billing for purchased livestock at prices higher than those at which purchased; making an unsecured loan to a big packer buyer for payment on a home; agreeing to ship no fat lambs east from Ogden except to Armour, in return for Armour's placing its orders for sheep and lambs with respondent or its subsidiary; failing to assess feed charges against a dealer for whom it held livestock; recording purchases and sales as "country transactions" instead of transactions subject to the Act; purchasing employees' livestock at a price in excess of market and promptly reselling at a loss; extending credits to a company owned by certain of its officers; improper use of proceeds of sales of consigned livestock; and other practices. The Secretary found that many of the violations operated for the benefit of employees and officials at the expense of many members of respondent. In re *Producers Livestock Marketing Association and Western Livestock Order Buyers*, 14 Agr. Dec. 109 (1955).

Where such practices by market agencies occur at a regulated yard, they can be remedied by action of the Secretary, but not where they occur at an unregulated yard.

The full evidentiary hearing rejected by respondent would have afforded an opportunity to show the effect of the regulation and its relation to Congressional policy embodied in the Act. The validity of the contested regulation cannot be determined merely from its face as an abstract matter in the absence of all relevant facts. To hold, as did the Court of Appeals, that the regulation is invalid on its face, is to close one's eyes to the realities of the situation. The blindness of justice relates to judicial impartiality, not self-imposed ignorance.

III. The Judgment of the Court of Appeals Unlawfully Denies the Right of the Stockyard Company to an Evidentiary Hearing

The lower court has held the contested regulation invalid and directed the issuance of a cease and desist order against the stockyard company without there having first been an evidentiary hearing and findings and an order based thereon by the Secretary. This is beyond the power of the court.

A. There Are Genuine Material Issues of Fact.

The allegations made in the complaint with respect to the purpose and effect of the contested regulation (R. 41) may be summarized as follows: That, with respect to the designated area, market agencies (commission firms), including complainant, are forbidden (a) to sell livestock to a packer, feeder, or other outlet; (b) to purchase so as to meet competition and maintain volume for its outlets; (c) to furnish market advice to its farmer members except that they ship to and sell at the Denver yard; (d) to reconsign livestock to other stockyards in case of a glut at the Denver yard; or (e) to buy, sell, or take consignments

in the country except for movement to the Denver yard.

All these allegations were denied in the answer of the Stockyard Company (R. 45-46). Also, the answer of the Stockyard Company set out four affirmative defenses (R. 46-47). They were, in substance, that the stockyard company and market agencies at the stockyard cannot furnish, or patrons receive, reasonable stockyard services at the stockyard so long as market agencies operating there engage in the activities prohibited by the contested regulation. These activities render it impossible for the market agencies to carry out their primary duties and responsibilities at the Denver yard. The Secretary, through his Judicial Officer, stated "We are not prepared to say that nothing in the respondent's answer has a material bearing on the outcome of the proceeding" (R. 28).

Following its answer the Stockyard Company moved for the issuance by the Secretary of a subpoena directing complainant to produce for examination and copying certain books and records described and identified in the motion (R. 48-50). Respondent resisted and demanded that the regulation be held invalid on its face (R. 54-56). The hearing examiner concluded that facts must be presented to see whether the regulation, or action taken under it, is reasonable under the circumstances (R. 71). He therefore set a time for an evidentiary hearing and stated (R. 71)—

> "When complainant has presented its evidence, respondent [the stockyard company] then may move to dismiss, renew its request for a subpoena, or take whatever other action it desires. If respondent then needs the subpoena, it is my present opinion that it will be granted . . ."

Thus, faced with the probability of the issuance of a subpoena *duces tecum*, complainant thereupon filed its "Election to Rest" (R. 72). In its Election to Rest complainant asked the Secretary to dispose of the complaint through ignoring all issues of fact raised by the pleadings. Complainant stated that it would not attend an evidentiary hearing, that it would not present evidence, and that it rested and submitted its case for final decision by the Secretary (R. 72).

Complainant's Election to Rest was similar to a motion for judgment on the pleadings. Such a motion will ordinarily be denied where genuine issues of fact are present. *Friedman* v. *Washburn Co.*, 145 F. 2d 715 (C.A. 7, 1944); *Bass* v. *Hoagland*, 172 F. 2d 205 (C.A. 5, 1949). The Secretary, through his Judicial Officer, concluded that the issues made with respect to unreasonableness and the like could be decided only after the relevant and material facts are ascertained (R. 28). Consequently, on the limited record before him, he could not find the contested regulation invalid upon its face (R. 32), as asserted in the Election to Rest. Accordingly, he dismissed the complaint (R. 33). Having had no evidentiary hearing, the Secretary carefully refrained from passing on the validity of the regulation, but merely concluded that in the absence of evidence he could not hold it invalid. When complainant before the Secretary refused to submit proof of its allegations at an evidentiary hearing, the Secretary was justified in dismissing its complant.

B. The Court of Appeals Judgment Would Convert the Administrative Proceeding Into One That Denies the Stockyard Company an Evidentiary Hearing.

Despite the Secretary's conclusion that the issues as to unreasonableness of the regulation "can be decided only after the relevant and material facts are ascertained" (R. 28), the Stockyard Company, under the Court of Appeals decision, would have no opportunity to present those facts.

The Secretary left the proceeding in a posture whereby the regulation would not be held invalid without an evidentiary hearing. The Court of Appeals by its judgment would convert the proceeding into one where, despite controverted issues of fact, the Stockyard Company would never have an evidentiary hearing before the regulation has been held invalid.

Section 310 of the Act states that if "after a full hearing" the Secretary is of the opinion that a regulation of a stockyard owner is unjust, unreasonable, or discriminatory, then he may prescribe a just, reasonable, and non-discriminatory regulation and may order the stockyard owner to cease and desist from the violation and conform to the prescribed regulation. The Secretary did not violate the section for he did not determine that the regulation was unjust, unreasonable, or discriminatory. The Court of Appeals, by its decision, does force a violation since the court directs the Secretary to "enter an appropriate order requiring the Denver Union Stock Yard Company to cease and desist from issuing or enforcing its Regulation 10(c)" (R. 84).

The first consequence of this action by the Court of Appeals is that, despite material issues of fact, the

company is denied an evidentiary hearing to which it has a right, and its regulation is held invalid without any such hearing. The second consequence of this action by the Court of Appeals is that the Court of Appeals invaded the field of administration discretion, determined that the regulation was invalid in toto as to every person and every possible application, and ignored the primary jurisdiction and duty of the Secretary to determine questions of reasonableness after findings on evidence of record. These matters are dealt with later.

The Court of Appeals attempts to vindicate its action by stating "it is fundamental to the law that the submission of evidence is not required to characterize 'a full hearing' where such evidence is immaterial to the issue to be decided" (R. 81). But the legal issue to be decided, as raised by the complaint and answer, was whether the regulation is "unjust, unreasonable, or discriminatory". With material issues of fact present evidence was clearly material to resolve the question of reasonableness.

The Court of Appeals also said that this Court has defined a "full hearing as one in which ample opportunity is afforded to all parties to make, by evidence and argument, a showing fairly adequate to establish the propriety or impropriety, from the standpoint of justice and law, of the step asked to be taken" (R. 81). But no opportunity has been afforded the Stockyard Company to make an adequate showing by evidence, nor under the Court of Appeals decision would any such opportunity ever be afforded if that Court's mandate on its judgment goes down to the Secretary.

Finally the Court of Appeals said that, "Where no genuine or material issue of fact is presented the court

or administrative body may pass upon the issues of law after according the parties the right of argument" (R. 81). But there were genuine and material issues of fact, both those raised by the Stockyard Company's denial of the allegations of the complaint and those resulting from the Stockyard Company's affirmative allegations. Also, it might be added, there is a genuine and material issue as to the suppositious facts that the Court of Appeals imagined and assumed (R. 82) for purposes of its decision.

C. The Stockyard Company Has a Right to an Evidentiary Hearing Before Its Regulation Is Held Invalid.

The requirement in §310 of the Act that there be a "full hearing" before a determination is made that a company regulation is invalid and a cease and desist order entered, was taken by Congress directly from § 15 (1) of the Interstate Commerce Act. This Court at the time of the enactment of the Packers and Stockyards Act, 1921, had already held under the Interstate Commerce Act (*Interstate Commerce Commission* v. *Louisville and N. R. Co.*, 227 U.S. 88 (1913)) that the requirement of a full hearing confers the privilege of introducing testimony, and at the same time imposes the duty of deciding in accordance with the facts proved. This Court later reiterated that holding in *The New England Divisions Case*, 261 U.S. 184, 200 (1923). Again, under the Packers and Stockyards Act itself, this Court pointed out that the Act demands a full hearing and the order is void if such a hearing is denied; also a "full hearing" requires "the taking and weighing of evidence, determinations of fact based upon the consideration of the evidence, and making of an order supported by such findings . . ."

Morgan v. *United States,* 298 U.S. 468, 477-478, 480 (1936).

Here there has been no such hearing. While the Secretary has not attempted to hold the regulation invalid without such hearing, the Court of Appeals has done so, and its action is contrary to the Act and illegal. The Stockyard Company is entitled to an evidentiary hearing before the regulation, or any part of it or any particular application of it, is held invalid. The Court of Appeals may not deprive the Stockyard Company of that right.

D. The Court of Appeals Is Not Authorized to Deprive the Secretary of Agriculture of His Primary Jurisdiction in the Matter.

The Act (§310) provides that if the Secretary after full hearing is of the opinion that the existing regulation is unreasonable, he may prescribe what will be the just, reasonable, and non-discriminatory regulation and may order that the stockyard owner "conform to and observe the regulation . . . so prescribed". This requires the taking and weighing of evidence by the Secretary, findings of fact by him, and an order by him supported by his findings. *Morgan* v. *United States,* 298 U.S. 468 (1936), 304 U.S. 1 (1938).

The Court of Appeals may not hold the existing regulation invalid until the Secretary has held a full hearing, reached an opinion, and made findings on the evidence and an order based thereon. This the Secretary has not yet done. In stating that the procedure under Title III of the Packers and Stockyard Bill was modeled very closely on that of the Interstate Commerce Act, the Congressional Committee recognized the primary jurisdiction doctrine under that Act as announced by this Court in *Texas and Pacific Ry.*

Co. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907). The action of the Court of Appeals is contrary to the decisions of this Court in *United States* v. *Western Pacific R. Co.*, 352 U.S. 59 (1956); *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939); and *Ambassador, Inc.* v. *United States*, 325 U.S. 317, 324 (1945). See also, *Lichten* v. *Eastern Airlines*, 189 F.2d 939, 941 (C.A. 2, 1951); and *Kelly* v. *Union Stockyards and Transit Co. of Chicago*, 190 F. 2d 860 (C.A. 7, 1951).

E. The Court of Appeals Is Not Authorized to Exercise Essentially Administrative Functions.

The contested regulation applies to dealers, as well as to market agencies (commission firms) such as Producers Livestock Marketing Association. It applies to transactions, of diverse character, including soliciting business for other markets, for sale at outside feed yards or country points, endeavoring to secure customers to sell or purchase livestock at other than the Denver yards, diverting or attempting to divert livestock from the Denver yard which would otherwise come to that yard, or engaging in any practice or device which would impair or interfere with the normal flow of livestock to the public market at the Denver yard. The normal marketing area from which livestock would normally come to the public market at the Denver yard is so defined as to include some, but not other, counties in Colorado.

Even assuming *arguendo* that the regulation is invalid in some aspect, the function of the reviewing court ends once the error of law is laid bare. The Act places in the Secretary (§310) the authority to prescribe what different regulation would be just, rea-

sonable, and non-discriminatory. When the Court of Appeals directs the Secretary to annul the entire regulation and thereby prevents the Secretary from prescribing a reasonable regulation, the Court usurps the administrative function. There doubtless are many situations where the regulation is unquestionably valid. The Court of Appeals, by its order wiping out these statutory duties of the Secretary, has assumed administrative functions and decided contrary to the decisions of this Court in *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20-21 (1952); *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, 55 (1948); *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 145-146 (1940); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618-623 (1944); and *Far East Conference* v. *United States*, 342 U.S. 570, 574-575 (1952). The Court of Appeals has prevented any regulation by the company or the Secretary of a situation concerning which that court has no knowledge of record.

CONCLUSION

It is respectfully submitted that the judgment of the Court of Appeals should be reversed and the decision of the Secretary, made through his Judicial Officer, affirmed.

Respectfully submitted,

FREDERIC P. LEE
1200 18th Street, N. W.
Washington 6, D. C.

Attorney for American Stock Yards Association